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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1133

DER-RONG CHOUR,

Petitioner,

—v.—

BENEDICT J. FERRO, *et al.*,

Respondents.

DER-RONG CHOUR,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

Page

PRELIMINARY STATEMENT
Proceedings Below..... 1

QUESTIONS PRESENTED..... 6

STATEMENT OF FACTS..... 7

ARGUMENT:

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT ON ITS OWN MOTION WHERE VALID CONSTITUTIONAL ISSUES WERE RAISED ON THE FACT OF THE COMPLAINT..... 15

A. A Court May Not Dismiss a Complaint Raising Constitutional Issues Sua Sponte.... 15

B. A Court May Not Dismiss a Complaint At This Stage of the Litigation..... 20

C. The Complaint Dismissed Below, Alleging Violations of Fourth

ARGUMENT continued:

Page

and Fifth Amendment Rights and Violations of INS Regulations and Seeking Damages for Same, and Other Relief, Was a Valid Complaint on Its Face..... 24

II. THE COURT OF APPEALS ERRED IN PRECLUDING REVIEW OF PETITIONER'S CLAIM FOR A STAY OF DEPORTATION UNDER STOKES V. UNITED STATES.. 28

A. The Stokes Decision Permits Petitioner A Stay of Final Deportation Pending Final Adjudication of His I-130 Spouse Visa Petition..... 35

B. Chour is Eligible For Extended Voluntary Departure..... 39

III. THE SECOND CIRCUIT COURT OF APPEALS ERRED IN ASSESSING COSTS AGAINST PETITIONER AND HIS ATTORNEY..... 44

ARGUMENT continued:

Page

A. The Second Circuit Standard for Imposition of Monetary Sanctions Is Improper and in Conflict with the Standards Enunciated by Other Circuit Courts of Appeal..... 45

B. Imposition of a Fine Against Petitioner's Attorney Created a Chilling Effect on Counsel's Willingness to Proceed with His Representation of Petitioner, Thereby Effectively Denying Petitioner His Statutory and Constitutional Right to Counsel..... 53

1. Statutory Right to Counsel..... 53

2. Constitutional Right to Counsel. 54

ARGUMENT continued:

Page

C. Imposition of a Fine Against Counsel Placed Him in the Position of Possibly Breaching His Ethical Duty to Represent Petitioner According to the Code of Professional Responsibility..... 56

D. The Imposition of a Fine Against Petitioner's Attorney Without Reasonable Notice and an Opportunity to Show Cause to the Contrary Constituted a Violation of the F.R.A.P., Rule 46(c), and Notions of Procedural Due Process Pursuant to the Fifth and Fourteenth Amendments..... 59

E. The Imposition of a Fine Against Attorney for Petitioner Constituted A Violation of Principles

ARGUMENT continued:

Page

of Equal Protection Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution..... 62

F. Assessment of Damages and Double Costs Against Petitioner Was an Abuse of Discretion and Highly Prejudicial..... 71

CONCLUSION..... 73

TABLE OF CITATIONS

Page

Cases Cited:

Acevedo v. INS, 538 F.2d 918 (2d Cir. 1976)..... 46,47,48, 51,52

Alvarez v. District Director of INS, 539 F.2d 1220 (1976)..... 64

Ballenilla-Gonzalez v. INS, 546 F.2d 515 (2d Cir. (1976)..... 26,27

Bell v. Hood, 327 U.S. 678 (1945)..... 19

Biao Pan v. INS, Civ. No. 77-4026 (2d Cir. 1977).... 67,69

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)..... 25

Bridges v. Wixon, 326 U.S. 135 (1945)..... 55

Butz v. Economou, ___U.S. ___, 98 S.Ct. 2894 (1978).. 25,26

Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975)..... 55,56

Cases Cited Continued:

Page

Cheng Fan Kwok v. INS, 392 U.S. 206 (1968)..... 31,32,34

Chour v. Ferro, 573 F.2d 1289 (2d Cir. 1977) cert. den. 434 U.S. 1063 (1978)..... 4

Chour v. INS, 578 F.2d 464 (2d Cir. 1978) application denied ___U.S.___, 46 U.S.L.W. 3740 (May 30, 1978)..... 5

Colato v. INS, 531 F.2d 678 (2d Cir. 1976)..... 32,33

Conley v. Gibson, 355 U.S. 41 (1957)..... 23

Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944)..... 16

Fan Wan Keung v. INS, 434 F.2d 301 (2d Cir. 1970)... 40,42,43, 44

Foti v. INS, 375 U.S. 217, 230..... 34

Glasser v. U.S., 315 U.S. 60 (1942)..... 55

Haggy v. Solem, 547 F.2d 1363 (8th Cir. 1977)..... 20

Cases Cited Continued:

	Page
Hanley v. Condrey, 467 F.2d 697 (1972).....	60,61
Jamison v. Butcher & Sherrerd, 68 F.R.D. 479 (E.D.Pa. 1975).....	18
Katris v. INS, 562 F.2d 866 (2d Cir. 1977).....	46,47
Kiefel v. Las Vegas Hacienda, 404 F.2d 1163 (7th Cir. 1968).....	48
Lewis v. State of New York, 547 F.2d 4 (2d Cir. 1976).....	16,17,18
Matter of Vera Rodriques, 10 I&NS Dec. 113 (BIA 1962).....	41
Matter of Yeung, 13 I&NS Dec. 528 (BIA 1970).....	40
Miles v. Dickson, 387 F.2d 716 (5th Cir. 1967).....	50,60,61
Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975).....	35
Overmeyer v. Fidelity & Deposit Co. of Maryland, 554 F.2d 539 (2d Cir. 1977).....	47

Cases Cited Continued:

	Page
Powell v. Alabama, 287 U.S. 45 (1932).....	55
Scheuer v. Rhodes, 416 U.S. 232 (1974).....	22,23,25
Sexton v. Barry, 233 F.2d 220,224 (6th Cir. 1956)...	63
Stokes v. INS, 74 Civ. 1022 (S.D.N.Y. 1976).....	7,11,12, 28,29,30, 31,33,34, 35,36,39, 40,41,43
U.S. v. Ross, 535 F.2d 346 (6th Cir. 1976).....	48,49

Statutes Cited:

8 C.F.R. section 242.....	8,31,33, 53
8 C.F.R. section 243.....	9
8 C.F.R. section 245.....	39
22 C.F.R. section 42.10.....	39
8 U.S.C. section 1101 (a)(16).....	39
8 U.S.C. section 1105(a)....	32

Statutes Cited Continued:

	Page
8 U.S.C. sections 1153(a)(1), (2), (3), (4), (5).....	29
8 U.S.C. section 1201(a)....	39
8 U.S.C. section 1325.....	56
28 U.S.C. section 1912.....	45
28 U.S.C. section 1927.....	45,48,60,
I&NA section 101(a)(16).....	39
I&NA section 221(a).....	39

U.S. Constitution Cited:

Fourth Amendment.....	3,20,24
Fifth Amendment.....	3,20,24, 59,62,63
Sixth Amendment.....	55
Fourteenth Amendment.....	59,62,63

Other Authorities:

ABA Code of Professional Responsibility, Canon 7...	52,57
ABA Code of Professional Responsibility, DR7-101...	58

Other Authorities Continued:

	Page
Federal Rules of Appellate Procedure, Rule 38.....	46,48,65, 66,67
Federal Rules of Appellate Procedure, Rule 46(c).....	46,59,61, 62
Federal Rules of Civil Procedure, Rule 12(b).....	17
Federal Rules of Civil Procedure, Rule 56.....	21
INS Operations Instruction 242.10.....	41,42

APPENDIX

Decision.....	A-1 - A-2
Opinion.....	A-3 - A-22

In The

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No.

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IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Proceedings Below

That part of the petition dealing with Docket No. 78-6034 was commenced by service of a summons and

and complaint, filed in the United States District Court, Southern District of New York, on February 1, 1978.[1] The petitioner, Der-rong Chour (hereinafter, "Chour"), brought suit against Benedict J. Ferro, individually and as District Director, Immigration and Naturalization Service (hereinafter, "INS"), Buffalo, New York; Anthony M. DeGaeto, individually and Trial Attorney, INS; certain unknown named deportation officers, individually and as employees of the INS; Maurice F. Kiley, District Director, INS; charging that they were violating

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1. See, C.A. App. p. 3. References noted C.A. App. are to documents filed in the Joint Appendix to the Second Circuit United States Court of Appeals.

petitioner Chour's Fourth and Fifth Amendment rights and that they were violating their own regulations. In addition to money damages, Chour also sought mandamus, contempt and injunctive relief.

Following the filing and serving of the summons and complaint, on February 1, 1978, petitioner made an application for an order to show cause to stay deportation. (C.A. App. 13). This came before the Part I judge, Judge Pierce, who granted a temporary stay. (C.A. App. 71). On February 3 and 9, 1978, the order to show cause was heard before Judge Griesa. (C.A. App. 93, 104). The parties filed papers in support and in opposition to the preliminary injunction sought by Chour (C.A. App. 13, 35,

58), and on February 9, 1978, without the benefit of an answer to the complaint, discovery, or a hearing on the issues of the case, and without prior notice to Chour, the District Court, sua sponte, dismissed the complaint. The final order and judgment were entered on February 23, 1978.

On November 22, 1978, the Second Circuit Court of Appeals affirmed the District Court's dismissal of the complaint, stating that the claims asserted by petitioner were either barred by collateral estoppel or were patently frivolous and lacking in any merit.[2]

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2. Chour v. Ferro, 573 F.2d 1289 (2d Cir. 1977), cert. denied, 434 U.S. 1063 (1978), was addressed to issues relating to Chour's allegations that he was denied constitu-
(fn. cont'd.)

Docket No. 78-4017 arose from a petition for review of a decision of the Board of Immigration Appeals hereinafter, ("Board" or "BIA"), dated February 1, 1978, which denied petitioner's motion to reopen his deportation proceeding to permit him to become a permanent resident alien by immigrating from Canada. The Court of Appeals, in Chour v. INS (App. pp. 3-17) granted the Government's motion for summary affirmance of the decision of the BIA and assessed damages in the sum of $1,000 and double costs against

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(fn. cont'd.)
2. tional due process in his original deportation hearing in 1974; Chour v. INS, 578 F.2d 464 (2d Cir. 1978), application denied ___ U.S. ___, 46 U.S.L.W. 3740 (May 30, 1978), this action is the subject of part of the petition filed herein. (Docket No. 78-4017).

his attorney, David C. Buxbaum. Chour's motion to consolidate his petition for review of the Board's order with his appeal in Docket No. 78-6034, assessment of damages and double costs against the INS, referral to a new panel, and a hearing, was denied in its entirety. (App. 21-22).

QUESTIONS PRESENTED

1. Whether a court may properly, on its own motion, dismiss a complaint on its merits, when it has before it only the summons and complaint, an application for an order to show cause for injunctive relief, before there has been any discovery, without a hearing on the merits or notice to the plaintiff was being contemplated.

2. Whether the Second Circuit Court of Appeals erred where it

refused to consider a stay of deportation of petitioner under the consent decree in Stokes v. U.S., 74 Civ. 1022 (S.D.N.Y. 1976).

3. Whether the Second Circuit Court of Appeals abused its discretion by assessing the sum of $1,000 and double costs against attorney for petitioner pursuant to its dismissal of petitioner's motion for review of an INS order refusing to reopen deportation proceedings against him.

STATEMENT OF FACTS

Petitioner is an alien crewman who is a native of China. He was originally arrested on or about July 18, 1974. An order to show cause and a notice of hearing were issued on July 18, 1974 and petitioner posted a

$2,500 bond as required by the INS. (C.A. App. 5).

The deportation hearing took place on September 4, 1974. At said hearing, Chour was not advised of his right to counsel, to cross-examine witnesses, to examine and object to evidence, to present evidence on his own behalf and to appeal the Immigration Judge's decision to the Board of Immigration Appeals (C.A. App. 5), all of which is in violation of the INS' own rules and regulations. (See, 8 CFR section 242.) Petitioner was not represented by counsel at the hearing and was found to be deportable with voluntary departure being granted until October 4, 1974.

Almost three years later, Chour's bond was wrongfully cancelled

by respondents, as petitioner was never properly informed of his pending deportation as is required by the applicable regulations. (C.A. App. 6). (See, 8 CFR section 243.) On June 6, 1977, petitioner was arrested and held for immediate deportation and was wrongfully detained without ever being given a full fledged formal bond hearing by respondents. (C.A. App. 6).

Petitioner obtained counsel and attempted to reopen and appeal his case in an effort to reverse the earlier finding of deportability. (C.A. App. 6). Chour was originally subject to the jurisdiction of respondents' Buffalo, New York district office; however, he later moved to New York City, where he filed two applications for adjustment of

status on or about September 30, 1977. (C.A. App. 6). Following his marriage to a resident alien, he filed an I-130 petition on September 30, 1977. Despite this, respondent's Buffalo officials denied petitioner access to his file by refusing to transmit them to respondents' New York City office. The refusal by respondents to carry out this purely ministerial duty improperly withheld and deprived the petitioner of his right to the file. (C.A. App. 6, 7.).

Following his applications for adjustment of status, on November 3, 1977, petitioner filed an application for a stay of deportation with respondents' New York City district

office based on the pending adjustment of status petitions. Due to respondents' refusal to transfer Chour's files to the New York City district office, said office was unable to stay the deportation or adjudicate the petitions. (C.A. App. 7).

Consequently, the United States District Court for the Southern District of New York and the Second Circuit Court of Appeals denied a stay of deportation. However, while the application for a stay was before these courts, respondents, although aware of a consent judgment with direct application to the instant case, Stokes v. INS, withheld same from said Courts.[3] (C.A. App. 8).

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3. Stokes v. INS, 74 Civ. 1022 (fn. cont'd.)

The I-130 petition was approved on January 25, 1978. (C.A. App. 8). Respondents moved to deport Chour on February 1, 1978, which is the same date that the summons and complaint and the application for an order to show cause to stay deportation was made in Docket No. 78-6034 in the Southern District of New York. The Part I judge, Judge Pierce, granted the temporary stay. (C.A. 71).

On February 3 and 9, 1978, the order to show cause was before Judge Griesa in the Southern District of New York. (C.A. App. 93, 104). On February 9, 1978, without the benefit

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(fn. cont'd.)
3. (S.D.N.Y. 1976--INS stipulated that it would not deport aliens with pending I-130 applications.

of an answer to the complaint, discovery, or a hearing on the issues of the case, and without proper notice to Chour, the District Court sua sponte, dismissed the complaint. The final order and judgment were entered on February 23, 1978. (C.A. App. 119).

Petitioner then filed a petition for review to the Second Circuit Court of Appeals of the decision of the BIA denying petitioner's application to reopen his deportation proceeding. (App.pp.10-11). Additionally, petitioner filed an appeal of the District Court opinion in Docket No. 78-6034 and moved to consolidate said appeal with his petition for review of the Board's order (Docket No. 78-4017). (App. pp. 10-11).

On April 28, 1978, the Second Circuit denied petitioner's motion for consolidation of the petition for review with his appeal from Judge Griesa's opinion (Docket No. 78-6034). The court then granted the Government's motion for summary affirmance of the decision of the BIA and assessed damages in the sum of $1,000 and double costs against petitioner and his attorney, David C. Buxbaum. (App. pp. 3-17).

The Second Circuit, on November 22, 1978, entered its order affirming the District Court decision in Docket No. 78-6034. (App.pp. 1-2). The Court found that the Government had made an oral request for dismissal, and therefore the District Court had the power to dismiss the complaint without

requiring that a formal written motion be filed. The court then summarily found that petitioner's claims were barred by collateral estoppel or were patently frivolous and lacking in any merit.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT ON ITS OWN MOTION WHERE VALID CONSTITUTIONAL ISSUES WERE RAISED ON THE FACT OF THE COMPLAINT.

A. A Court May Not Dismiss a Complaint Raising Constitutional Issues Sua Sponte.

In its decision, the District Court's opening remarks indicated clearly that it was dismissing petitioner's complaint sua sponte.

> "THE COURT: On Chour against Ferro, there has been a great deal of briefing and I am prepared to dictate a ruling, so if you would, sit down.

> "The action is totally without merit. The application for injunctive relief is denied, and I am, on my own motion, dismissing all further claims, and I am specifically referring to a claim for damages." (Emphasis supplied.) (C.A. App. 105).

The dismissal of an action by a court on its own motion, for failure to state a claim, is, to say the least, an extreme measure. More than a quarter century ago, the Second Circuit, through the late Chief Justice Clark cautioned against "judicial haste which in the long run makes waste." Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

In Lewis v. State of N.Y., 547 F.2d 4 (2d Cir. 1976), the court, in dealing with a sua sponte dismissal of a pro se complaint, applied the following rationale:

"Great circumspection is required before terminating such actions, particularly in their embryonic stages. It is prudent for judges to avoid an inquisitorial role, and not search out issues more appropriately left to a motion by the opposing party.

"If defendants had moved to dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Lewis would have received notice of the challenge to the sufficiency of the complaint. He would have had an opportunity to respond by seeking leave to amend, or setting forth arguments supporting the validity of his claim. Because Judge Port dismissed sua sponte, however, Lewis did not receive notice of the proposed disposition and was unable to respond." (Ibid., at 5-6; fn. omitted.)

It is respectfully submitted that this rationale is equally applicable to the instant petition. Moreover, at the end of the above language, the

court, in footnote 4, noted that "(f)ailure to afford plaintiffs an opportunity to address the court's sua sponte motion to dismiss is, by itself, grounds for reversal." 574 F. 2d 4 at 6 (emphasis supplied).

A review of the transcript of February 9, 1978 reveals that the District Court refused to allow petitioner's counsel to have oral argument or file a memorandum to rebut the court's ruling. (C.A. App. 111, 117-118). The court quickly read a reply brief addressed to the issues of sanctions and the stay and then determined that oral argument was not necessary. (C.A. App. 112).

In Jamison v. Butcher & Sherrerd, 68 F.R.D. 479 (E.D.Pa. 1975), it was held that a dismissal for failure to

state a claim upon which relief can be granted calls for a judgment on the merits after the court has assumed jurisdiction and that such relief is a matter not properly raised sua sponte.

The Supreme Court in Bell v. Hood, 327 U.S. 678 (1945), held that where a complaint in a federal court is so drawn as to seek recovery directly under the Court or laws of the United States, the Court must entertain the suit, except where: (1) the alleged claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or (2) it is wholly insubstantial and frivolous. (Id. at 682).

However, in Bell, supra, at p. 684, the Court specifically stated that the issue whether federal courts can grant

money recovery for damages alleged to have been suffered as a result of federal agents violating the Fourth or Fifth Amendments has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it.

Since this was some of the specific relief being sought by petitioner below, it was improvident and reversible error for the Second Circuit to summarily affirm the District Court's dismissal of the complaint sua sponte.

B. A Court May Not Dismiss a Complaint At This Stage of the Litigation.

Much of the discussion above is directly applicable herein and will be incorporated by reference. In Haggy v. Solem, 547 F.2d 1363 (8th Cir. 1977), after holding the dismissal of

a complaint as improper and premature, the court indicated (at p. 1364):

> "If appellant's claims are in fact illusory, the Federal Rules of Civil Procedure provide the means to make such determination upon a sufficient development of the record even before the trial. F.R.C.P. 56."

Clearly, the District Court had a most sparse record before it. There had been a summons and complaint; an application for an order to show cause with supporting affidavits; and two affidavits in opposition. There had been no answer to the complaint; no motion to dismiss; no prior notice to the petitioner of the court's determination to dismiss; no oral argument on the validity of the claims alleged; no evidence or discovery related to the validity of the claims. In effect,

there was no record before the court.

Counsel had appeared for a hearing on the petitioner's application for a stay of deportation and without having his day in court, petitioner found himself out of court.

It is respectfully submitted that the Circuit Court's affirmance of the District Court's dismissal pursuant to its own motion without allowing petitioner to submit any proof to establish his claim, prior to the dismissal, was error.

The United States Supreme Court held in Scheuer v. Rhodes, 416 U.S. 232 (1974), that:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is

not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

> 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (fn. omitted.)" (Emphasis supplied.)

Clearly, on the basis of this language (and the rest of the decision) and on the basis of all of the foregoing, the courts below acted prematurely and were in error in so acting.

C. The Complaint Dismissed Below, Alleging Violations of Fourth and Fifth Amendment Rights and Violations of INS Regulations and Seeking Damages for Same, and Other Relief, Was a Valid Complaint on Its Face.

The Statement of Facts, supra, is based primarily upon the complaint which was dismissed below. It is submitted that it adequately pleaded a federal cause of action on its face. The complaint alleges facts which, if proven, would make out a prima facie case of violations of petitioner's Fourth and Fifth Amendment rights by the respondents. These violations are alleged to have been unlawful detention and denial of due process through respondents' violation of their own rules and regulations.

As a result of the foregoing, petitioner was seeking injunctive relief and damages. On its face, therefore, it would appear that a valid cause of action had been stated.

The District Court did not question jurisdiction; consequently, this was not a cause of dismissal. Nor did it question personal immunity of federal agents, which, on the basis of Butz v. Economou, ____U.S.____, 98 S.Ct. 2894 (1978), would not have been a valid argument. In Butz, the Supreme Court held that federal agents may be liable for damages arising out of their violations of an individual's constitutional rights. In so doing, the Court followed and extended its rulings in Scheuer v. Rhodes, supra, and Bivens v. Six Unknown Federal

Narcotics Agents, 403 U.S. 388 (1971). In Bivens, as in Butz, the Supreme Court did not regard issues involving violation of constitutional rights by federal agents as being "frivolous".

It is respectfully submitted that the Second Circuit nor the District Court had a sufficient record before it on which to determine the lack of legal sufficiency of the petitioner's complaint. The petitioner alleged serious violations of his constitutional rights and was entitled to his day in court.

In dismissing petitioner's complaint, the transcript of February 9, 1978 reveals that the District Court relied upon Ballenilla-Gonzalez v. INS, 546 F.2d 515 (2d Cir. 1976) for determining that the complaint in this

case was "frivolous". (C.A. App. 105). Even if it is assumed, arguendo, that the petitioner's complaint was identical to the Ballenilla-Gonzalez complaint, it is clear that in the latter case the due process issue involved an express waiver of the right to counsel based upon a misapprehension of the law (other issues were raised but were not determinative).

In the instant case, allegations of unlawful detention, violations of due process, attacking the very essence of the deportation hearing, and other violations were alleged. On the face of the complaint, it is submitted that a valid cause of action was set forth. While the District Court was properly concerned with the inherent delay built into the area

of immigration litigation (where frivolous suits have been brought solely to seek to delay deportation), this does not mean it can ride rough shod over every suit alleging violations of an alien's constitutional rights. There is a proper way to determine legal sufficiency of complaints. Precipitous action by district courts in this area is more dangerous, and ultimately more time consuming, than the malady they are attempting to cure.

II. THE COURT OF APPEALS ERRED IN PRECLUDING REVIEW OF PETITIONER'S CLAIM FOR A STAY OF DEPORTATION UNDER STOKES V. UNITED STATES.

In Stokes v. United States, 74 Civ. 1022 (S.D.N.Y. 1976), the plaintiffs challenged the manner in which the INS processed spouse preference

petitions (I-130 petitions) and the treatment of the alien beneficiaries of those petitions during their pendency. The preference petition procedure is the means by which the INS verifies the family relationship of a lawful United States resident and an alien of the same family. An otherwise eligible alien with such a family relationship is entitled to special preference. See, 8 U.S.C. sections 1153(a)(1), (2), (3), (4) and (5). (App. p. 17). (C.A. App. 20).

The Stokes consent decree establishes safeguards to insure, inter alia, that an alien otherwise eligible for permanent residence is not deported while his I-130 petition is being processed. Paragraph 41 of the decree provides in pertinent part as follows:

> "41. Pending final adjudication of an I-130 spouse visa petition, the District Director shall nor deport or institute deportation proceedings against the alien beneficiary or in any manner direct the alien beneficiary to leave the United States if approval of the visa petition would make the beneficiary eligible to file an application for adjustment of status under section 245 of the Act, or for extended voluntary departure, provided however, that the District Director may seek to deport where he is clearly frivolous or where there are substantial adverse factors which would lead to denial of adjustment of status or extended voluntary departure... ." (Emphasis supplied.)

In granting the Government's motion for affirmance, the Second Circuit stated that "...Chour has never previously presented his Stokes theory to the Board, which precludes review of that claim here." (App.pp.13-15). To be sure, the court did discuss briefly

its opinion as to petitioner's claim under Stokes (App.pp.12-15), but that language should only be considered dicta in light of the court's statement that consideration of the Stokes claim was precluded from review.

That the Court of Appeals erred in ruling that petitioner's claims under Stokes were precluded from review is clear. In Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), the Supreme Court held that under 8 U.S.C. section 1105 (a) an alien seaman's appeal from a denial of a suspension of deportation pending submission of a seventh preference application embraces "only those determinations made during a proceeding conducted under 242(b), including those determinations made incident to a motion to reopen... ."

392 U.S. 206. The case thus established that the Court of Appeals had exclusive jurisdiction over Chour's appeal from the Board's decision not to reopen his deportation proceedings.

In Colato v. INS, 531 F.2d 678 (2d Cir. 1976), petitioner's appeal to the Second Circuit under 8 U.S.C. 1105(a), on the single issue of the refusal to reopen a visa petition application previously denied by the BIA was dismissed with the court's instructions that the appeal lie in the District Court.

> "It is clear to us that the denial of a visa petition, under the circumstances presented here, was neither a final order of deportation nor made pursuant to section 242(b) administrative proceedings." 531 F.2d 678

By this standard, Chour's claims

were within the scope of review as his deportation was being attempted "pursuant to" section 242(b). Further, the failure to abide a consent decree which mandates preclusion of deportation is "intimately connected with a deportation proceeding" and justified review of the claims under 8 U.S.C. section 1105(a). See, Colato v. INS, 531 F.2d 678, 680. It follows, therefore, that if the effect of the consent decree's protective feature precluding deportation derives from Chour's "eligibility" for extended voluntary departure in connection with the visa issuing process (this is the mechanism of the Stokes decree), the process itself must be examined or the rule of the Second Circuit as set forth in Colato will not be given

effect.

As the Stokes decree did not exist at the time of the original deportation hearing for Chour, the scope of review should have been accommodated to embrace the Stokes claims. See, Foti v. INS, 375 U.S. 217, 230, n. 16, approved, Cheng Fan Kwok v. INS, supra at 216, n. 17.

The dicta of the court of appeals relative to its rejection of petitioner's Stokes claims demonstrated the court's totally having blinded itself to the issues raised in petitioner's memoranda. The court then "covered its tracks" by stating that review of Stokes claims were precluded. (App.pp.13-15). The conclusion that petitioner's claims were jurisdictionally defective constitutes plain error which must be

reversed.

A. The Stokes Decision Permits Petitioner A Stay of Final Deportation Pending Final Adjudication of His I-130 Spouse Visa Petition.

The Second Circuit rejected Chour's argument that Chour is entitled to a stay of deportation pending final adjudication of his I-130 spouse visa petition, citing Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), for support. (App. pp. 13-15).

Decided on January 3, 1975, the holding of the Second Circuit in Noel v. Chapman cannot be controlling where superseded by the Stokes consent decree. As will appear, the Stokes decree effectively eclipses the effect of the Noel decision that there is no constitutional bar to deporting aliens such as petitioner pending

obtaining a visa.

The Court of Appeals stated next that the INS' approval of Chour's I-130 petition did not render petitioner eligible for adjustment of status within the United States; he must first seek admission into the United States by applying for a visa at a United States Consulate abroad, which would require a waiver from the Attorney General in view of the order of deportation outstanding against Chour. (App. pp. 13-15).

The above reasoning of the Court is totally inconsistent with the spirit and letter of Stokes. One point of this proceeding is to implement a decree precluding deportation. The court's conclusion that the decree cannot have effect because Chour was

already under an order of deportation is to conclude that since the INS was already violating the consent decree Chour is not entitled to the consent decree's protection.

Paragraph 41 of the decree, applicable to Chour, requires the Immigration and Naturalization Service to vacate any deportation orders with respect to Chour.

Further, while as a matter of common parlance among practitioners in immigration law, the term, "adjustment of status", is generally used to refer to those people who actually undertake final adjustment of status in the United States; technically and properly, the term, "adjustment of status", can be applied both to those who finally adjust in the United States

and those who finally obtain visas in a place like the Canadian Consulate. In fact, practice has changed recently, so that the I-151, the so-called, "green card", which is the final step in the adjustment of status, is now mailed from the Canadian Consulate to the United States to most aliens who go to the Canadian Consulate or other consulates abroad in order to take the final step in their adjustment of status.

While technically this trip to Canada is a visa application, in fact it is merely a step in adjustment of status from an alien to a permanent resident of the United States. Thus the Court of Appeals' affirmance of the BIA decision, holding that Chour is not entitled to adjust his status

under section 245, is clearly irrelevant to the case in point. While indeed petitioner is not eligible for adjustment of status under section 245, he is nevertheless eligible for adjustment of status by going to Canada under the rules of 22 C.F.R. section 42.10, I&NA section 101(a)(16), and section 221(a); 8 U.S.C. section 1101 (a)(16) and 8 U.S.C. section 1201 (a).

B. Chour is Eligible For Extended Voluntary Departure.

The Court of Appeals concluded that Stokes was inapplicable to petitioner because petitioner was ineligible for extended voluntary departure. The court stated (App. pp. 13-15):

> "In view of his past refusal to depart voluntarily and his absconsions he would be denied any extension or reinstatement of his former right

> of voluntary departure. See, Fan Wan Keung v. INS, 434 F. 2d 301, 304-05 (2d Cir. 1970); Matter of Yeung, 13 I&NS Dec. 528 (BIA 1970)."

The above reasoning assumes that the failure of the INS to reinstate voluntary departure is not a violation of the Stokes decree. If Stokes applies, the INS is precluded from not reinstating voluntary departure, as the INS is precluded under paragraph 41 from the following activities:

> "Pending final adjudication of an I-130 spouse visa petition, the District Director shall not deport or institute deportation proceedings against the alien beneficiary or in any manner direct the alien beneficiary to leave the United States if approval of the visa petition would make the beneficiary eligible...for extended voluntary departure... ." (Emphasis supplied.)

Eligibility for extended voluntary

departure, in turn, is controlled by Operations Instruction 242.10(a)(6)(i).

The first requirement of O.I. 242.10(a) is that the alien be "statutorily eligible" for voluntary departure. Such statutory eligibility for alien crewmen was confirmed by the BIA in Matter of Vera Rodriques, 10 I&NS Dec. 113 (BIA 1962). This is consistent with the broad purpose and language of paragraph 41 of the Stokes decree.

The Operations Instructions controlling extended voluntary departure is O.I. 242.10(b), which states:

> "Class 6(i) may be granted voluntary departure until the American Consul is ready to issue an immigrant visa and, in the discretion of the District Director, may be an interim of thirty days conditioned upon continuing availability of an immigrant visa as shown in the latest Visa Office Bulletin and upon

> the alien's diligent pursuit of efforts to obtain the visa."

In addition, the "Service policy" with respect to granting a voluntary departure is, according to the Immigration and Naturalization Service's own Operations Instructions, "set forth in O.I. 242.10(a)(6)(i)." That policy is strictly a function of the availability of a visa number. Petitioner's is current. Moreover, the discretion to deport an alien with a pending I-130 spouse visa petition can only be exercised by the Service where the marriage is fraudulent. See, O.I. 242.10(a)(25). Petitioner's bona fide marriage precludes the INS exercise of discretion to deport him.

The Court of Appeals relied upon Fan Wan Keung v. INS, 434 F.2d 301

(2d Cir. 1970) for support of its statement that petitioner would be denied any extension of reinstatement of his former right of voluntary departure. (App.pp. 13-15). Yet examination of this pre-Stokes decision fully supports petitioner's position. The Second Circuit stated in Fan Wan Keung as follows:

> "The Service's Operations Industructions apparently authorized the nunc pro tunc extension of voluntary departure, even in the cases of crewmen. We are informed that until recently this dispensation was accorded by District Directors in their discretion where they considered it appropriate. The policy is now changed. The District Directors no longer extend this privilege to crewmen, of a general proposition, who manage to remain by using obvious dilatory tactics, absent some special equities, such as a close relative who is a citizen or legal resident alien." Fan Wan Kueng

v. INS, supra, at 305. (Emphasis supplied.)

Thus, the Second Circuit recognized, even before Stokes, the basic INS policy which formed the background for the negotiations which led to the Stokes consent decree. It was a background which included a general policy affording aliens married to permanent resident aliens the opportunity of achieving the status of permanent resident alien. Fan Wan Keung, supra, at 305. Thus, the conclusion by the Court of Appeals that Chour is ineligible for the protection afforded by Stokes is error which must be righted by this Court.

III. THE SECOND CIRCUIT COURT OF APPEALS ERRED IN ASSESSING COSTS AGAINST PETITIONER AND HIS ATTORNEY.

A. The Second Circuit Standard for Imposition of Monetary Sanctions Is Improper and in Conflict with the Standards Enunciated by Other Circuit Courts of Appeal.

During the past few years, and in an increasing number of matters before it, the Second Circuit has assessed damages against counsel pursuant to 28 U.S.C. sections 1912[4] and 1927[5] and Federal Rules of Appellate Procedure, Rules 38[6] and 46(c)[7]. By reading these sections together, the Court has found a number of cases before it as warranting a fine against counsel for bringing a "frivolous or unreasonable and vexatious appeal". Acevedo v. INS, 538 F.2d 918 (2d Cir. 1976); see also, Katris v. INS, 562

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4. 28 U.S.C. section 1912 provides as follows:

> "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

5. 28 U.S.C. section 1927 provides as follows:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

6. F.R.A.P., Rule 38, provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to appellee."

7. F.R.A.P., Rule 46(c), provides:

> "A court of appeals may after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."

F.2d 866 (2d Cir. 1977); Overmeyer v. Fidelity & Deposit Co. of Maryland, 554 F.2d 539 (2d Cir. 1977).

In Acevedo, the leading Second Circuit decision on point, the Court held that where a petition seeking review of a Board of Immigration Appeals decision denying petitioner's motion to reopen a deportation hearing to apply for suspension of deportation failed to state significant new evidence for consideration by the Court, the petition for review was utterly frivolous and completely lacking in any merit. The Court concluded that the petition was interposed solely as a delay tactic by counsel who, according to the Court, was well aware of its meritlessness. Double costs were taxed personally against counsel pur-

suant to 28 U.S.C. section 1927 and F.R.A.P., Rule 38. 538 F.2d 918 (2d Cir. 1976).

Other Circuits, however, have shown much greater reluctance in assessing damages and costs against an attorney. In Kiefel v. Las Vegas Hacienda, 404 F.2d 1163, cert. denied 395 U.S. 908, 89 S.Ct. 1750, 33 L.Ed. 2d 221, rehearing denied 395 U.S. 987, 89 S.Ct. 2128, 23 L.Ed. 2d 776 (7th Cir. 1968), the Seventh Circuit stated that the power to assess costs on an attorney guilty of misconduct should be exercised only in instances of a serious and studied disregard for the orderly process of justice. 404 F.2d at 1167.

In U.S. v. Ross, a Sixth Circuit case arising after Acevedo, the court

was faced with the propriety in which situations involving a 28 U.S.C. section 1927 issue should be invoked. 535 F.2d 346 (6th Cir. 1976). In Ross, the court stated that it was inappropriate to impose section 1927 sanctions for an unintended inconvenience to the court, no matter how annoying it might be; personal responsibility, stated the court, should flow only from an intentional departure from proper conduct, or, at a minimum, from a reckless disregard owed by counsel to the court. 535 F. 2d 346 at 349. Increased costs of litigation due to counsel's inadvertence or negligence were specifically found by the court as insufficient for imposition of section 1927 sanctions. 535 F.2d 346 at 350.

The Fifth Circuit has held that taxation of court costs against plaintiffs' attorneys, following entry of summary judgment for defendants, was erroneous where plaintiffs' attorneys acted in good faith and upon written authorization from their clients. Miles v. Dickson, 387 F.2d 716 (5th Cir. 1967).

It is clear from the foregoing analysis that there exists diverse views among the Circuit Courts with respect to the appropriate factual circumstances required to assess monetary sanctions against an attorney in a proceeding before the court.

In the instant case, petitioner contended that the BIA erred in dismissing petitioner's Motion to Reopen deportation proceedings against

him. The procedural right to appeal to the Second Circuit pursuant to the Petition for Review of the INS ruling is uncontroverted in the record.

Yet under the critical circumstances of impending deportation facing petitioner, the Court imposed $1,000 damages and double costs against petitioner and petitioner's attorney for bringing the appeal. It is not surprising that the Second Circuit Court of Appeals in the case at bar also decided Acevedo. Petitioner submits that the assessment of the fine and double costs constituted an abuse of discretion by the Court and was in contravention with the proper standards for imposing such sanctions as stated by the courts in the Fifth, Sixth and Seventh Circuits.

Under the opinions expressed by the latter Circuits, petitioner's attorney acted in a proper, professional manner.

Further, even under Acevedo standards, petitioner submits that the Petition for Review was neither frivolous, meritless, nor brought for purposes of delay. The Petition was filed for the purpose of seeking reversal of the ruling of the District Director, a ruling claimed by petitioner to be clearly erroneous. Therefore, the Second Circuit's assessment of damages and double costs was also improper under its own standard as enunciated in Acevedo. (See also, discussion of attorneys' duty under Code of Professional Responsibility, infra, at IIIC.)

B. Imposition of a Fine Against Petitioner's Attorney Created a Chilling Effect on Counsel's Willingness to Proceed with His Representation of Petitioner, Thereby Effectively Denying Petitioner His Statutory and Constitutional Right to Counsel.

1. Statutory Right to Counsel

Immigration and Naturalization Service regulations provide that a respondent in a deportation hearing may be represented by an attorney of his choice at no expense to the Government.[8] 8 C.F.R. section 242.10.

8. 8 C.F.R. section 242.10 provides in pertinent part:

"Hearing. The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation... ."

Counsel was retained by petitioner at the proceedings before the INS. Clearly, the logical extension of petitioner's statutory right to counsel at the hearing level reaches to appellate motions arising out of such hearings.

However, the assessment of damages against his attorney has abridged petitioner's right to the attorney of his own choice. With the threat of significant fines looming over him, the Court has created a chilling effect on counsel's willingness to continue zealous representation of his client.

2. Constitutional Right to Counsel

It has long been settled that in criminal cases the denial of the

Sixth Amendment right to the assistance of counsel is reversible error which cannot be cured by the application of any harmless error rule. See, for example, Glasser v. U.S., 315 U.S. 60 (1942). Similarly, it has long been held that the right to counsel means the right to effective counsel. Powell v. Alabama, 287 U.S. 45 (1932).

In Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975), the court recognized that while a deportation hearing is not a criminal proceeding, it is fraught with serious consequences to the alien. Id. at 1301. The Supreme Court observed in Bridges v. Wixon, 326 U.S. 135, 154 (1945):

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right

> to stay and live and work in this land for freedom. That deportation is a penalty--at times a most serious one--cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

In such cases, in addition to the serious consequences of deportation itself, there is also the possibility that criminal prosecutions for violations of the immigration laws may result under 8 U.S.C. section 1325. Castaneda-Delgado v. INS, supra at 301.

C. Imposition of a Fine Against Counsel Placed Him in the Position of Possibly Breaching His Ethical Duty to Represent Petitioner According to the Code of Professional Responsibility.

The American Bar Association Code of Professional Responsibility, Canon 7, provides that "(a) lawyer

should represent his client zealously within the bounds of the law."

While the above axiom excludes assertion of a position in litigation that is frivolous, it is equally clear that vigorous representation, when brought in proceedings filed in good faith and not as part of a frivolous position, should not be tampered with by a court's assessment of monetary sanctions against the attorney. To do so places counsel in a position of compromise in which he can neither represent his client effectively nor fulfill his ethical obligations toward society as an officer of the court.

Further, by failing to continue with zealous representation, even in the face of monetary sanctions, could expose counsel to disciplinary sanc-

tions pursuant to DR7-101(A).[9]

The attorney's dilemma is thus broadened should he continue with zealous representation and risk further fines or intentionally fail to seek the lawful objectives of his client and consequently risk possible suspension or disbarment.

Clearly, counsel must not be placed in the position of having to choose between two unprofessional positions. The Court of Appeals' fine, however, places counsel in such a predicament. The result is injustice for all:

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9. DR7-101(A) provides in part as follows:

> "A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by the law and the Disciplinary Rules... ."

petitioner is prejudiced, counsel is compelled to compromise, and society suffers because the administration of justice cannot fairly proceed.

D. The Imposition of a Fine Against Petitioner's Attorney Without Reasonable Notice and an Opportunity to Show Cause to the Contrary Constituted a Violation of the F.R.A.P., Rule 46(c), and Notions of Procedural Due Process Pursuant to the Fifth and Fourteenth Amendments.

Federal Rules of Civil Procedure, Rule 46(c), provides as follows:

> "Disciplinary Power of the Court Over Attorneys.
>
> A Court of appeal may, after reasonable notice of an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of any court."

In Miles v. Dickson, 387 F.2d 716 (5th Cir. 1967), the court, while not basing its holding on procedural grounds, nevertheless commented that the failure of a court to require attorneys to personally pay court costs pursuant to 28 U.S.C. section 1927 without notice and a hearing was wrong.

The Second Circuit has also recognized the procedural due process rights of attorneys faced with section 1927 sanctions. In Hanley v. Condrey, 467 F.2d 697 (1972), the court, rather than see continued a case which it thought should be concluded, noted at p. 467:

> "The question of costs remains. Section 1927 of Title 28 U.S.C. permits taxation against any attorney personally 'who so multiplies the proceedings

> in any case as to increase costs unreasonably and vexatiously'.
>
> "This litigation should now be at an end. To assess costs against the attorney might, as suggested in Miles v. Dickson, 387 F.2d 716 (5th Cir. 1967) (per curiam) and Fed.R.App.P. 46(c), require notice and a hearing--a procedure to which we neither subscribe nor which we reject. In any event, further proceedings in federal courts should be avoided."

Thus, while there has not yet been a direct holding on the procedural aspect of section 1927, the dicta expressed by the Second and Fifth Circuit Courts is clear: an attorney, as any citizen, should not be deprived of property without first being afforded procedural due process.

Indeed, Fed.R.App.P. 46(c) is quite explicit with respect to the requirements of notice and opportunity

to be heard.

The Court in the instant case, having summarily decided that petitioner's attorney brought this proceeding in violation of section 1927, deprived the attorney of his right to reasonable notice and opportunity to be heard prior to the imposition of the fine in violation of Rule 46(c) and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The fine levied by the Court should, therefore, be rescinded.

E. The Imposition of a Fine Against Attorney for Petitioner Constituted A Violation of Principles of Equal Protection Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner's statutory and

constitutional right to effective counsel, and the chilling effect placed upon those rights due to the fine levied against counsel, breaches the right to effective counsel in violation of the Equal Protection clause of the Fifth and Fourteenth Amendments to the United States Constitution.

In Sexton v. Barry, 233 F.2d 220, 224 (6th Cir. 1956), the court stated that "(t)he equal protection of the law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination."

The discussion above concerning the similarity between a criminal defendant's right to counsel and the status of an alien facing deportation

and potential criminal prosecution is pertinent in considering the denial of equal protection of the law. While case law is clear that classifications under the immigration laws need only be supported by a rational basis to fulfil equal protection guarantees, Alvarez v. District Director of INS, 539 F.2d 1220 (1976), it is equally apparent that counsel's reluctance to proceed with vigorous representation of his client's cause denies the client effective counsel of his own choice.

To impose upon petitioner the burden of proceeding pro se or retaining new counsel at this point in the proceedings would cause both petitioner and the Court undue delay and expense. Petitioner has selected and retained

counsel of record as his legal representative; the actions of the Court may cause him to proceed in this matter under dissimilar conditions and without the protections guaranteed to others in similar circumstances. The fine against counsel, therefore, has effectively denied petitioner equal protection.

In addition, imposition of a fine against a privately retained attorney pursuant to 28 U.S.C. section 1927 or Fed.R.App.P. 38 constitutes a violation of equal protection principles. The classification distinction in this argument is private versus public sector attorneys. The violation of equal protection arises from two facets.

First, imposition of a fine

against private counsel has, as discussed previously, a profound effect upon his willingness to proceed with vigorous representation. He may face additional fines in this case; his representation of other clients with similar claims will be impeded. On the other hand, the Government attorney is implicitly, if not explicitly, shielded from such losses. His pocketbook is safe; his client, the Government, will continue to receive vigorous representation.

The sanctions of section 1927 and Rule 38 have the effect of discriminating among members of the bar without a rational basis. The fine against the attorney for petitioner, a private attorney, is therefore a violation of equal protection.

Second, petitioner has researched various cases that have imposed sanctions pursuant to section 1927 and Rule 38. No cases found involved imposition of sanctions against a Government attorney. It is submitted that the courts have unfairly discriminated against private counsel by imposing sanctions upon members of the private sector only. Apparently, Government attorneys are protected or, at the least, treated differently than private counsel. Should a meritless prosecution be initiated, a dismissal is granted. But no more. The Government attorney, it seems, does not face the possibility of a fine against him personally.

In Biao Pan v. INS, Civ. No. 77-4026 (2d Cir. 1977), petitioner

an alien crewman, petitioned the Second Circuit for a review of an order of the BIA denying petitioner's motion to reopen deportation proceedings against him on the grounds that the INS proceedings had been conducted in violation of petitioner's right to due process under both the United States Constitution and the Code of Federal Regulations. In turn, the INS moved for an order dismissing the petition for review as frivolous, and imposing damages and double costs upon petitioner or his counsel.

Subsequent to the filing of briefs and affidavits in support of the respective motions, the INS withdrew its motion and the court remanded the matter to the BIA for its reconsideration. Despite the frivolous and time-

consuming argument set forth by respondents, the court did not impose costs on either party.

Biao Pan is a prime example of the absolute refusal by the court to treat frivolous litigation brought by Government counsel in the manner in which it deals with alleged similar acts by private counsel. This distinction is without justification and is highly prejudicial to the alien. The Government lawyer, it appears, is free to bring frivolous motions, but private counsel must be ever cautious of persistent assertion of his client's legal rights under the law.

Petitioner submits that the legal system in this country was not built upon discrimination between public and private sector attorneys and this

Court must not sanction such policy at this time.

This distinction between Government and private counsel is a classification without a rational basis. Imposition of sanctions against private counsel is a denial of equal protection where similar conduct of Government attorneys goes unpunished. Whatever the proper standard, it must be applied equally.

In the instant case, counsel for petitioner was fined by the Court for bringing a frivolous appeal. Petitioner submits that if it was the Government who had filed a meritless appeal, the case would have merely been dismissed and no action taken against the Government attorney. It is upon this additional ground that petitioner submits that private coun-

sel was denied equal protection of the law. Imposition of the fine, therefore, was improper and should be rescinded.

F. Assessment of Damages and Double Costs Against Petitioner Was an Abuse of Discretion and Highly Prejudicial.

It must also be noted that the Second Circuit Court of Appeals imposed the fine not only upon counsel but upon petitioner as well. The arguments as to the inappropriateness of the assessment to counsel has been set forth above at length.

Equally as unjust, if not more so, is the assessment of damages against petitioner, an alien crewman. As a general rule, the alien population in the United States is far from wealthy. In the case at bar, much of petitioner's legal representation has been per-

formed pro bono due to petitioner's inability to pay counsel. Petitioner submits, therefore, that the assessment of damages in the sum of $1,000 and double costs against him personally is ludicrous. Thus it appears that not only is the INS, with its virtually infinite resources, seeking to deport petitioner, but to completely destroy him, at least financially, as well.

CONCLUSION

For all of the reasons stated herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF
DAVID C. BUXBAUM, P.C.
Attorneys for
Petitioner

DAVID C. BUXBAUM, ESQ.

Of Counsel

January, 1979

D E C I S I O N

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of November, one thousand nine hundred and seventy-eight.

Present: HONORABLE HENRY J. FRIENDLY
HONORABLE WALTER R. MANSFIELD
HONORABLE THOMAS J. MESKILL,
Circuit Judges,

DER-RONG CHOUR,

Plaintiff-Appellant,

-against-

BENEDICT J. FERRO, Individually and as District Director, Immigration and Naturalization Service, Buffalo, N.Y., et al.,

Defendants-Appellees.

Dkt. No. 78-6034

Appeal from the United States District Court for the Southern District of New York

DECISION

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order and Judgment of said District Court entered on February 23, 1978, dismissing the complaint be and it hereby is affirmed.

Upon this record, including the Government's oral request for dismissal to which plaintiff-appellant replied, the District Court had the power to dismiss the complaint without requiring that a formal written motion be filed. The claims asserted by plaintiff-appellant were either barred by collateral estoppel, see Chour v. Ferro, 573 F.2d 1289 (2d Cir. 1977), cort. denied, 434 U.S. 1063 (1978), Chour v. INS, 578 F.2d 464 (2d Cir. 1978), application denied, ___ U.S. ___, 46 U.S.L.W. 3740 (May 30, 1978), or were patently frivolous and lacking any merit.

s/ Henry J. Friendly
Henry J. Friendly, U.S.C.J.

s/ Walter R. Mansfield
Walter R. Mansfield,
U.S.C.J.

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term 1977

(Submitted: March 28, 1978
Decided: April 28, 1978)

Docket No. 78-4017

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DER-RONG CHOUR,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE.

Respondent.

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Before SMITH, MANSFIELD and OAKES, Circuit Judges.

Petition for review of decision of the Board of Immigration Appeals dated February 1, 1978, denying petitioner's application to reopen proceeding for his deportation after this Court, on October 12, 1977, had affirmed the Board's deportation order, direc-

ting that the mandate issue forthwith, and had affirmed an order of the Northern District of New York denying petitioner's application for a writ of habeas corpus.

The Board's decision ordering petitioner's deportation is affirmed.

David C. Buxbaum, Esq., N.Y., for Petitioner.

Robert S. Groban, Jr., Special Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Patrick H. Barth, Assistant United States Attorney, of counsel), for Respondent.

MANSFIELD, Circuit Judge:

Der-Rong Chour ("Chour"), an alien Chinese crewman who in 1974 overstayed his authorized 29-day stay in the United States, absconded, and was later arrested, petitions for review of a decision of the Board of Immigration Appeals ("Board") dated February 1, 1978, denying his application to reopen the proceeding for his deportation to permit him to apply for adjustment of status pursuant to §245 of the Immigration and Nationality Act ("Act"), 8 U.S.C. §1255.

On February 10, 1974, Chour was admitted into the United States as a non-immigrant crewman authorized to remain not more than 29 days. He failed to depart or to obtain an extension of his stay and absconded. On July 17, 1974, he was arrested by the Immigration and Naturalization Service ("INS") in Boston. On July 18, 1974, deportation proceedings were instituted against him. On August 14, 1974, after he had been fully advised of his rights, the order to show cause why he should not

be deported was read and explained to him in Chinese and English. On September 4, 1974, a deportation hearing was held before an Immigration Judge in New York City. Chour acknowledged that he understood (1) the purpose of the hearing, (2) the interpreter provided to assist him, and (3) that he had a right to appear with his own retained counsel. He elected to speak for himself, admitted all of the essential facts establishing deportability, and accepted the INS's offer to depart voluntarily within 30 days. He was served with a decision and deportation order, both of which were explained to him, to the effect that if he did not depart voluntarily within 30 days he would be deported to the Republic of China on Taiwan or to Hong Kong. When he failed to depart within 30 days, a warrant was issued on November 20, 1974, for his deportation. Again he absconded, this time until June 6, 1977, when he was apprehended by the INS in Albany, New York.

Chour next applied to the Northern District of New York for a writ of habeas corpus on various grounds, including his acquisition of a labor certification, ownership of property, engagement to marry a permanent resident alien, and the pendency of general amnesty legislation in Congress. However, he did not advise the district court that he was already the subject of a 1974 deportation proceeding in New York or that he was the subject of a warrant of deportation because he had failed to depart voluntarily and had failed to report for deportation. When this information was adduced by the INS, Chour attacked the 1974 deportation proceeding on due process grounds. Judge Port of the Northern District dismissed his petition on the ground that Chour had not exhausted his administrative remedies, and stayed deportation for 10 days to permit him to do so.

On July 7, 1977, Chour filed a notice of appeal from Judge Port's order. (Dkt. No. 77-2074). On June 20, 1977, Chour also moved to reopen his

1974 deportation proceeding on the due process grounds referred to above, claiming that in view of more recent developments (his labor certification, engagement to a permanent resident alien, ownership of property, etc.) his deportation would be unjust and he should be permitted to adjust his status to that of permanent resident pursuant to §245(a) of the Act, 8 U.S.C. §1255(a). This application was denied by Immigration Judge Gordon W. Sachs on the grounds that Chour, having entered the United States as an alien seaman, was ineligible for adjustment of status and no showing had been made of lack of due process.

Upon appeal the Board on July 14, 1977, dismissed Chour's appeal on the grounds that he had waived counsel at his earlier deportation hearing and that by his own admission he was clearly deportable. Having exhausted his administrative remedies Chour petitioned this Court for review of the Board's decision (Dkt. No. 77-4136), thus gaining an automatic stay of de-

portation pursuant to §106 of the Act, 8 U.S.C. §1105a(3), and remaining in the United States, free on a $10,000 bond posted by him. This petition for review was consolidated with the appeal from Judge Port's order, by our order dated July 19, 1977.

On October 12, 1977, after carefully reviewing the record, the briefs of the parties and hearing oral argument, in an oral ruling from the bench we affirmed the order of the Northern District of New York denying Chour's petition for a writ of habeas corpus and affirmed the Board's decision with directions that the mandate issue at once. We found Chour's claims to be meritless and frivolous. On October 18, 1977, we denied rehearing and any further stay. After granting a temporary stay on October 19, 1977, Justice Marshall on November 14, 1977, dissolved the stay and on November 15, 1977, Justice Brennan denied a stay.

In the meantime Chour on September 28, 1977, filed with the INS

a Form I-130 petition seeking confirmation that for immigration purposes his recent marriage was bona fide. During the period when the stay granted by Justice Marshall was pending he applied to the INS for withholding of deportation under asylum regulations, 8 C.F.R. §108, and §243 of the Act, 8 U.S.C. §1253(h), claiming that he would be persecuted politically if the deportation order were executed, even though no such request or grounds had been urged in the 1974 deportation proceedings. On January 25, 1978, the asylum request was denied and Chour was ordered by the INS to surrender for deportation by February 1, 1978. Chour then began an action in the Southern District of New York to enjoin his deportation because of the INS' approval of his I-130 petition and the existence of a consent judgment in Stokes v. United States, 74 Civ. 1022 (S.D.N.Y. 1976). Judge Pierce issued a stay of deportation until the matter could be heard by Judge Griesa, who on February 9, 1978, concluded, after hearing the parties, that the action

was "totally without merit," that this was a type of action in which aliens subject to deportation orders "use the federal courts in an endless series of meritless and dilatory tactics designed to stall departure from the country as long as possible," and that it was "really a travesty" to subject the Department of Justice, the INS and the court to "this kind of tactics" in the present case. Judge Griesa pointed out that the granting of an I-130 application simply verifies that the applicant is married to a resident of the United States, but does not change his status or provide him with a visa or any right to reside in the United States. Judge Griesa further found that the consent decree in the Stokes class action applies only to persons who might be eligible for adjustment of status under §245 and not to alien seamen who are expressly excluded from its provisions. He dissolved the stay, denied injunctive relief and dismissed the complaint.

Immediately upon Judge Griesa's decision being handed down Chour's attorneys filed with us a petition for review of the decision of the Board of Immigration Appeals denying Chour's application to reopen his deportation proceeding and ordering that he be deported by February 1, 1978 (the date which was extended by Judge Pierce so that Chour's injunction suit could be heard by Judge Griesa). By filing the petition for review Chour again obtained an automatic stay of his deportation pursuant to §106 of the Act, 8 U.S.C. §1105a. In response to Chour's petition for review the Government on February 16, 1978, moved for summary affirmance of the Board's decision under review, and assessment of damages and double costs against petitioner or his attorney pursuant to 28 U.S.C. s1912 and Rule 38, F.R.A.P., on the grounds that the petition is frivolous and interposed as a calculated delaying tactic, and for referral of the motion to this panel, which decided

United States ex rel. Chour v. Ferro, Dkt. Nos. 77-2074 and 77-4136 on October 12, 1977.

On March 14, 1978, Chour in turn moved to consolidate his petition for review of the Board's order (Dkt. No. 78-4017) with his appeal from the decision of Judge Griesa (Dkt. No. 78-6034), assessment of damages and double costs against the INS, referral to a new panel, and a hearing.

DISCUSSION

Because the petition for review raises for the most part substantially the same issues as those raised upon the appeal from Judge Griesa's order and in our earlier decision in United States ex rel. Chour v. Ferro, Dkt. Nos. 77-2074 and 77-4136, decided on October 12, 1977, the appeal has been referred to the prior panel for decision and/or oral hearing on the merits if deemed necessary.

The petition appears to represent one more step in an outrageous abuse of civil process through per-

sistent pursuit of frivolous and completely meritless claims in an effort to stall a deportation that has been repeatedly ordered by the Board and has been affirmed by us. Chour's contentions that he is entitled to an adjustment of status under §245 of the Immigration and Nationality Act, 8 U.S.C. §1255 or for a stay of deportation under the consent decree in Stokes v. United States, 74 Civ. 1022 (S.D.-N.Y. 1976), are baseless. Section 245 expressly provides that it "shall not be applicable to (1) an alien crewman." The consent judgment entered by Judge Brieant in Stokes[3] (para. 41) provides that deportation will be stayed only "if approval of the [I-130] visa petition would make the beneficiary eligible to file an application for adjustment of status under §245 of the Act or for extended voluntary departure, provided, however, that the District Director may seek to deport where he is satisfied that the I-130 visa petition is clearly frivolous or where there are substantial adverse facts which

would lead to denial of adjustment of status or extended voluntary departure." Chour, an alien seaman, is ineligible for adjustment of status, has not departed voluntarily within the period allowed him but, on the contrary, absconded and has been ordered to be deported. Approval of his I-130 petition cannot cure these deficiencies. He may not be readmitted into the United States without a waiver of deportability which the Attorney General will not issue. See §212(a)(17) of the Act, 8 U.S.C. §1182(a)(17). In view of his past refusal to depart voluntarily and his absconscions he would be denied any extension or reinstatement of his former right of voluntary departure. See Fan Wan Keung v. INS, 434 F 2d 301, 304-05 (2d Cir. 1970); Matter of Yeung, 13 I&NS Dec. 528 (BIA 1970). The INS' approval of Chour's I-130 petition, moreover, does not render Chour eligible for adjustment of status within the United States; he must first seek admission into the United States by applying for a visa at a United States

Consulate abroad, which would require a waiver from the Attorney General in view of the order of deportation outstanding against Chour. See §212(a)(17) of Act, 8 U.S.C. §1182(a)(17). Nor does the approval of the Chour I-130 petition permit him to remain in the United States, Noel v. Chapman, 508 F.2d 1023, 1027-28 (2d Cir.), cert. denied, 423 U.S. 824 (1975); Sui Fung Luk v. Rosenberg, 409 F.2d 555 (9th Cir. 1969), any more than does an application made on his behalf before a United States Consulate abroad for a quota preference and immigration visa. United States ex rel. Fen v. Esperdy, 423 F.2d 6, 8-9 (2d Cir. 1970); Armstrong v. INS, 445 F.2d 1395, 1396 (9th Cir. 1971). In any event, Chour has never previously presented his Stokes theory to the Board, which precludes review of that claim here. Cisternas-Estay v. INS, 531 F.2d 155, 160 (3d Cir. 1976).

Thus, there is not even a colorable legal or factual basis for the relief sought before the Board or here and, as we noted in Ballenilla-

Gonzales v. INS, 546 F.2d 515 at 521 (2d Cir. 1976), cert. denied, 98 Sup. Ct. Rep. 58 (1977), "our Government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure as long as possible. See also Acevedo v. INS, 538 F.2d 918 (2d Cir. 1976).

Petitioner's motion for consolidation of this petition for review with his appeal in Judge Griesa's opinion (Dkt. No. 78-6034) and for assessment of damages and double costs against the Government and its attorney is denied. The Government's motion for summary affirmance of the decision of the Board of Immigration Appeals is granted and the mandate shall issue forthwith. Damages in the sum of $1,000 and double costs are assessed against petitioner and his attorney, David D. Buxbaum, Esq.

F O O T N O T E S

1. 28 U.S.C. §1912 provides:

"Where a judgment is affirmed by the Supreme Court or a Court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

2. Rule 38, F.R.A.P. provides:

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

3. In Stokes the plaintiffs challenged the manner in which the INS processed spouse preference petitions (I-130 petitions) and the treatment of the alien beneficiaries of those petitions during their pendency. The preference petition procedure is the means by which the INS verifies the family relationship of a lawful United States resident and an alien of the same family. An otherwise eligible alien with such a family relationship is entitled to special pre-

ference status. See 8 U.S.C. §§1153(a)(1)(2)(4) and (5); Stokes v. United States, 393 F. Supp. 24 (S.D.N.Y. 1975).

The Stokes consent decree establishes safeguards to insure, inter alia, that an alien otherwise eligible for permanent residence is not deported while his I-130 petition is being processed. Paragraph 41 of the Stokes decree, therefore, provides that deportation of (and deportation proceedings against) an alien beneficiary a pending I-130 petition shall be stayed under certain circumstances. For the reasons explained, supra, those circumstances are not present in this case.

4. See notes 1 and 2, supra, and 28 U.S.C. §1927.

OPINION

OAKES, Circuit Judge (concurring):

I concur in the entire judgment except that assessing damages in the sum of $1,000 against petitioner.

78-4017

DECISION

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of September one thousand nine hundred and seventy-eight.

DER-RONG CHOUR,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Treating Petitioner's affidavit in opposition to the verified bill of costs as a motion to disallow the taxing of costs,

It is hereby ordered that the motion made herein by counsel for the petitioner to disallow the taxing of

DECISION

double costs and damages against David C. Buxbaum, Esq. individually and further, to reconsider the assessment of double costs and damages be and it hereby is denied.

s/ J. Joseph Smith

J. Joseph Smith

s/ Walter R. Mansfield

Walter R. Mansfield

s/ James L. Oakes

James L. Oakes,
Circuit Judges

No. 78-1133

Supreme Court, U.S.
FILED
MAR 15 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

DER-RONG CHOUR, PETITIONER

v.

BENEDICT J. FERRO, ET AL.

DER-RONG CHOUR, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1133

DER-RONG CHOUR, PETITIONER

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IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of two decisions of the court of appeals. His petition is jurisdictionally out of time with respect to one decision, and the only issue raised with respect to the other decision is without merit.

These cases arise out of petitioner's persistent but ultimately unsuccessful attempts to resist enforcement of a deportation order.[1] The history of the deportation order is stated in our Brief in Opposition in No. 77-645, *Chour* v.

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[1]See *Chour* v. *Ferro*, 573 F. 2d 1289 (2d Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

Ferro, a copy of which we sent to petitioner at the time it was filed in that case. Following this Court's denial of certiorari in that case,[2] petitioner was deported.

The first decision that the present petition seeks to have this Court review is *Chour* v. *INS*, 578 F. 2d 464 (2d Cir. 1978) (see Pet. App. A-3 to A-20). Petitioner contends that the court of appeals improperly reviewed his request for a stay of deportation (Pet. 28-44) and improperly assessed a fine of $1000 and double costs against petitioner and his attorney (Pet. 44-72). The decision in that case was entered April 28, 1978 (Pet. App. A-3). The court of appeals denied a post-judgment motion on September 15, 1978 (Pet. App. A-21 to A-22). Even assuming *arguendo* that the post-judgment motion was a petition for rehearing, the time for filing a petition for a writ of certiorari was not extended and, accordingly, the 90-day period provided by 28 U.S.C. 2101(c) expired on December 14, 1978. The petition was filed on January 18, 1979, and is therefore out of time. The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923).

The other case that petitioner seeks to have this Court review is *Chour* v. *Ferro*, No. 78-6034 (2d Cir. Nov. 22, 1978) (Pet. App. A-1 to A-2). There, the district court dismissed petitioner's complaint seeking money damages from officials of the INS and an injunction against his deportation, and the court of appeals summarily affirmed. The only claim petitioner raises is that the district court erred in dismissing the complaint *sua sponte* (Pet. 15-28). But as the court of appeals correctly noted (Pet. App. A-2), the district court dismissed the complaint on the oral request of the United States and only after petitioner had been notified and had replied. Therefore, the question petitioner

[2]See note 1, *supra*.

seeks to raise is not presented on this record. In any event, a district court's authority to dismiss a complaint *sua sponte* is well established. *Dougherty* v. *Harper's Magazine Co.*, 537 F. 2d 758 (3d Cir. 1976); *Literature, Inc.* v. *Quinn*, 482 F. 2d 372 (1st Cir. 1973); *Dodd* v. *Spokane County*, 393 F. 2d 330 (9th Cir. 1968).

It is therefore respectfully submitted that the petition for writs of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979